IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

**SECOND APPEAL NO. 511 OF 2004**

Vithal Baliba Walhekar.... ... Appellant.

Versus

Rambhau B. Walhekar (since decd.) through his L. Rs.... ... Respondents.

Mr. R.S.Apte with Mr. M.V.Limaye for the Appellant.

Mr. A. R. Anturkar for Respondent Nos.1A to 1F.

**CORAM : ANOOP V. MOHTA, J.**

**DATED : 23RD DECEMBER, 2005.**

**P. C.:**

This is a second appeal filed by the appellant (original defendant). There is a concurrent finding given by the courts below that the plaintiff (respondent) is an owner and in exclusive possession of the suit land. It has been further held that the document dated 7th February, 1994, Exh. 77, is not legal and valid. The trial court has held that the defendant is obstructing lawful possession of the

plaintiff, based on this, the declaration as sought has been granted and thereby the defendant has been perpetually directed not to interfere with the peaceful possession of the suit property.

2. Learned Counsel appearing for the appellant/ original respondent NO.1, basically contended that the Government record as observed, reflects the name of the defendant and further recital of the document also mentions the possession of the defendant. While considering the issue in a suit for injunction and declaration in reference to the property, it is necessary for the court to consider the physical and actual possession of the property by the plaintiff. Once, based on the evidence led by the parties, if both the courts come to a positive conclusion that the plaintiff has been in possession on the date of the filing of the suit for declaration and injunction, the document, as relied, cannot prevail over the actual physical possession recorded by the courts below. Mere recital of possession itself is not sufficient to decide the case of the actual physical possession of the party. The factum of physical possession, in the recitals to the document, no way disturbs and/or take away the right of the party to file a suit for

declaration and/or for an injunction on the foundation of actual possession. The physical possession of the property, at the relevant time is an essential for such suit and not mere recital in the registered or unregistered documents.

3. The learned Counsel appearing for the appellant has relied strongly on the evidence of the plaintiff and basically a sentence *"He ousted my father"*. The sentence, even if taken note of cannot be read in isolation. After going through the evidence, I am of the view that isolated sentence as reflected above in no way supports the finding given by the courts below in so far as the actual and physical possession of the suit property by the plaintiff (respondent). The evidence as a whole, if taken note of, I see there is no perversity as such which can be stated to be committed by the courts below while granting the order of injunction and declaration as sought.

4. In this background, I see there is no reason to interfere with the concurrent finding given by the courts below. The plaintiff’s right, even if any, based on the provisions of the Bombay Tenancy and Agricultural Lands Act no way disturbs the reasoning

given by the Courts as the finding is very clear that *"That the defendant has not obtained such permission from the Collector before the execution of the registered document dated 7.2.1994 (Ex.77), and therefore the said document is void abinitio".* In the result, the defendant is not entitled to claim any relief as sought on the basis of the document, Exh.77.

5. Taking all this into account, the present second appeal is dismissed.

Sd/-

**(ANOOP V. MOHTA, J.)**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

**CIVIL APPLICATION NO. 493 OF 2004**

**IN**

**SECOND APPEAL NO. 511 OF 2004**

Vithal Baliba Walhekar.... ... Appellant.

Versus

Rambhau B. Walhekar (since decd.) through his L. Rs.... ... Respondents.

Mr. R.S.Apte with Mr. M.V.Limaye for the Appellant.

Mr. A. R. Anturkar for Respondent Nos.1A to 1F.

**CORAM : ANOOP V. MOHTA, J.**

**DATED : 23RD DECEMBER, 2005.**

**P. C.:**

In view of the dismissal of the second appeal itself, this civil application does not survive and is

disposed of as such.

Sd/-

**(ANOOP V. MOHTA, J.)**